

UTAH SCHOOL LAW UPDATE

Gender as a Job Qualification

Law is rarely cut and dried, but there are times when one side of an issue is so frequently cited, we all forget the other side.

Gender discrimination in employment is

one example. For years, employers have been told they



cannot discriminate against an employee based solely on gender.

This is generally true, but there are exceptions. Under Title VII and Title IX of the Civil Rights Act, which prohibit gender discrimination, there is a provision that allows a school employer to discriminate. The provision states that a school may use sex as a bona fide occupational qualification (or BFOQ) where the qualification is "reasonably necessary to the normal operation" of the school.

In every day terms, this means a school can require a female teacher for girls' p.e. classes and a male teacher for the boys.

male teacher for the boys. The BFOQ exception, according to the U.S. Supreme Court, is "extremely narrow." So far, it has only been allowed where the school can show that the privacy interests of the students can not be accommodated by a reasonable rearrangement of job duties or some other method.

With regard to jobs involving access to locker rooms, Title IX specifically allows an employer to consider the employee's sex and courts have not been willing to force schools to make other accommodations for locker room supervision in lieu of hiring a coach or teacher based on gender.

However, outside of p.e. and coaching, schools

have not been able to use BFOQ in many other instances to excuse discriminatory hiring decisions.

Some schools have tried to be clever in their discrimi-



nation, tying positions together in an attempt to justify discrimination. This has not been a successful tactic.

For example, one school tried to combine the football coach position to the job of athletic director. The court found that this needlessly discriminated against females who could be denied a football coaching job but could serve as athletic director without violating student privacy.

A school could also choose to have a person of each gender serve in a particular job where gender might matter, such as school counselors. Utah State Office of Education

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UPPAC CASES

• The Utah State Board of Education revoked by default the Level 2 Secondary Education License of James Boegler. The revocation follows Mr. Boegler's failure to respond to allegations that he pursued a sexual relationship with a student both at school and the student's home and stalked the student.

UPPAC Case of the Month

Prescription drug abuse is a problem for many Utahns, not just educators. And like many Utahns, educators face loss of their jobs, and their licenses, when their use of prescription drugs spirals out of control.

Abuse of prescription drug cases before UPPAC run the gamut. In some instances, educators solicit medications from students or colleagues. In others, the educator is caught "doctor shopping" or breaking into homes to find medications.

Some educators aren't caught until they show up to school clearly under the influence of something and unable to perform their job duties. Others are discovered when a student, parent, or co-worker informs a

school or district administrator.

While some educators who have faced UPPAC over allegations of prescription drug abuse have recognized the effect of their use on their schools, many just don't get it.

For example, educators have argued that their solicitation of drugs from coworkers had no detrimen-

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Eye On Legislation

The battle against childhood obesity continues in schools across the nation.

The Illinois State Board of Education attempted to ban junk food in campus vending machines by administrative rule. Members of the Illinois Legislature's Administrative Rules Committee voted against the Board's proposed rule, citing the need to address other issues, such as the nutritional value of cafeteria offerings, first. Chicago Sun-Times.

Colorado Gov. Bill Owens vetoed legislation the would have required schools to stock half of their vending machines with fruit, milk, vegetables and other healthy choices. His concerns centered not on what else was happening

in the cafeteria, but in the propriety of the Legislature micromanaging schools and their vending machines. Denver Post.

The Utah Legislature has debated vending machine offerings in recent years as well, but has not sent any

bill to the floor. Committee debates on the issue have included concerns about revenue from

machines and their providers to Utah's chronically under-funded public schools. No debate was held on increasing funding to nationally comparable levels.

lost

the

Georgia may soon surpass Utah's bottom ranking in education funding based on new

legislation signed by its governor recently.

The legislation reduces class sizes, limiting classrooms to 18 in kindergarten, or 20 with a full-time aide, 23 students in grades 1-3

and 32 students in grades 4-9 for core subjects. Concerns were raised, however, about funding for additional teachers, classrooms and other resources the limits will require.

The Legislature included \$603 million dollars to fund the additional resources that are expected.

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Recent Education Cases

Morrison v. Board of Ed. of Boyd County, (E.D. KY 2006). A school

was found to have acted within constitutional boundaries when it required diversity training for all students. Parents complained that the train-

ing, which included sexual orientation, violated their children's First Amendment right to express their religious beliefs about homosexuality.

The court found that the training were intentional torts, not covered in no way required students to

adopt beliefs contrary to their own and sought only to prohibit speech that was harasscational process.

Patrick v. Palm Beach County School Board (Fla. Ct. App. 2006). native setting based on his long A school board was denied governmental immunity pending trial to determine if the board's actions

by immunity.

The board had concealed or misrepresented the records of a violent, emotionally disabled stuing and disruptive of the edu- dent. The school board wanted to place the student in a particular school and thus hid the fact that the student had been in an alterhistory of violence against his parents and teachers.

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UPPAC cases cont.

(Continued from page 1) tal effect.

Those who were asked for drugs, however, have a very different perspective.

As do parents who expect school personnel to model appropriate behaviors and encourage students, by example as well as words, to refrain from harmful activities, such as drug abuse.

Educators who have been asked for narcotic prescription drugs, or had their medications stolen from

their homes by a colleague, may feel compassion for the educator with a



drug problem, but can also be understandably angry at the violation of their trust and friendship. When the accused

educator is also a supervisor, the consequences are even

greater. While a supervisor may not recognize that he or she is pressuring a subordinate to do something

inappropriate, few teachers would feel at liberty to tell a principal how they really feel about the request for drugs.

As with any drug, overcoming a prescription drug addiction is a lifelong battle. Educators whose licenses are revoked or suspended based on prescription drug abuse will need extensive counseling and must be able to show concrete steps they will take to avoid similar issues in the future if they intend to apply for reinstatement of their educator license.

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Eye on Legislation (Cont.)

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but there is some question as to whether that money will be enough.

Omaha, Nebraska is taking a slightly different, and perhaps unconstitutional approach, redrawing its school system into three essentially race-based districts.

The Nebraska legislature passed a bill, signed by the governor, creating one largely white district, one that is mostly black and one that will be primarily Hispanic.

The express goal of the sponsor-

ing legislator was to give the black community control of its schools.

While several proposals for redefining the city's district were proposed, the race-based split succeeded, despite concerns expressed

by the state's Attorney General that the plan would engender multiple lawsuits.
Associated Press.

The *Arizona Republic* reports that two legal advocacy groups have sued to end the

state's high stakes graduation test, citing a lack of funding necessary to adequately prepare students to meet academic goals. The groups claim that students who complete the required course work should still receive a diploma even if they fail the state test (the Utah State Board of Education Rule provides what the groups are seeking, much to the consternation of some Utah Legislators).

The Arizona Superintendent of Public Instruction took issue with lawsuit claims that Arizona schools don't provide proper preparation for the test, noting that the state spends significant amounts of money on services to struggling students.

Your Questions

Q: If our school suspects a student has left campus to get high and then returned to campus, can we require a drug test?

A: If the school has **reasonable suspicion** that a student or group of students is engaged in drug use during the school day, it can require a drug test.

The test itself can be accomplished in several ways. Perhaps the best method is to call the local police and request that they send someone to the school to perform a saliva or What do you do when. . . ?

urine test.

The school could also purchase its own saliva test kit or require the student to have drug test results from a private provider sent to the school at the student's expense.

An onsite test is best, but we would not recommend that the school conduct a urinalysis without a trained professional (such as a police officer). A student could be suspended from school for drug use, even if the use is off-campus as long as it affects the school setting or a "person related to the school." U.C. 53A-11-904.

Q: What can I do if a student comes to my school to avoid a truancy citation at another school?

A: The school should have a policy in place that previous disciplinary proceedings MAY follow the student

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Recent Cases Cont.

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The teacher at the new school was injured by the student and the court determined that the board's actions, which were in violation of its own policies, made it substantially certain that someone would be injured. The educator was permitted to proceed with her case against the school board.

Clark County Education Association v. Clark County Sch. Dist. (Nev. 2006). The district's decision to not renew the teacher's employ-

ment contract was supported by substantial evidence.

The teacher had been admonished three times and suspended twice for unprofessional conduct.

The teacher's conduct all related to her inability or unwillingness to properly administer English Language Learner tests. The district provided the teacher with assistance and multiple opportunities to improve her performance.

Blackwell v Eskin (Commwlth. Pa. 2006). An assistant coach's

defamation claim against a sportscaster failed where the coach could not show that the sportscaster acted with actual malice.

The sportscaster reported that the coach was using cocaine heavily and was involved in a series of thefts from the team locker room.

The coach admitted his cocaine problem but claimed that the allegation he was involved in the thefts was defamatory.

The court did not find theft to be much of a stretch from an out-ofcontrol drug problem.

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The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions Cont.

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to the school, at the school's discretion.

The school may not be concerned if a high school senior had behavioral issues in 7th grade, but it should be very concerned if that same senior was about to be referred to juvenile court for truancy.

Once the policy is in place, the school should be very consistent about how the policy is applied. While the language of the policy should give the school discretion to make adjustments in extraordinary situations, the school should not treat similarly situated students differently.

In short, if recent truancy issues follow one student, those issues should follow all students unless there are truly extraordinary circumstances that caused the problems.

Q: Can a teacher take pictures of students doing class work to display on classroom bulletin board, screen savers or other areas in the school?

A: This issue is controlled by the Federal Family Educational Rights and Privacy Act (FERPA).

FERPA directs districts to annually tell their parents what the district considers "directory informa-

tion." The parent then has the right to tell the district NOT to release directory information about the parent's child, if the parent so desires.

Usually, school photos are consid-

ered a directory information item particularly if the school plans to have any kind of yearbook or school newsletter with photos of students. IF the district does not designate school photos as directory information, the photos may only be shared within the school. In this case, a classroom bulletin board would be fine, but pictures should not be posted to the classroom web page.

One other note of caution, however. While general pictures of class room activity are fun for kids to see and can be motivating, concerns have arisen, when the content of the pictures seems a bit strange.

For instance, some educators have taken their photography too far, focusing on one particular student or keeping files of students in provocative poses. An educator who has an abundance of photos of only one student, or many students engaged in questionable activities, may find him or herself questioned about his or her professional motives.